

College of Mount Saint Vincent and Local Union 74, Service Employees International Union, AFL-CIO, CLC. Cases 2-CA-25615 and 2-RC-21126

January 27, 1995

**DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION**

BY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

On February 2, 1993, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

Representation Case

The judge failed to rule on the Union's objections to the election.¹ The issues raised by the unfair labor practice charge decided by the judge were coextensive with the Union's objections to the election. The judge found that the Respondent committed numerous violations of Section 8(a)(1) of the Act including creating the impression that the employee's union activities were under surveillance, interrogating employees regarding their union activities, threatening employees that they would be replaced by outside contractors if they supported the Union, and threatening employees with discharge. We find that these violations prevented employees from voting in a representation election free of intimidation. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962); *Super Thrift Markets*, 233 NLRB 409 (1977). Accordingly, we sustain the objections and find the election must be set aside and a new election directed.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

¹Objections to the conduct of election were filed in Case 2-RC-21126. On May 29, 1992, the Regional Director issued an order consolidating cases and notice of hearing on objections.

²Based on our findings we sustain the following union objections: Objection 2: threatening employees with discharge and other reprisals because of their membership in and activities on behalf of Local 74; and Objection 6: other conduct designed to destroy laboratory conditions necessary for the holding of an election in an atmosphere free of interference, restraint, and coercion.

modified below and orders that the Respondent, College of Mount Saint Vincent, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

IT IS FURTHER ORDERED that the election in Case 2-RC-21126 is set aside and that the case is severed and remanded to the Regional Director for Region 2 to conduct a new election whenever he deems appropriate.

[Direction of Second Election omitted from publication.]

Nancy K. Reibstein, Esq. and *David Pollack, Esq.*, for the General Counsel.

Stephen F. Hannigan, Esq., for the Respondent.

Ronald Goldman, Esq. (Manning, Raab, Dealy & Sturm), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 9 and 10, 1992,¹ in New York, New York. The complaint herein, which issued on May 28 and was based on an unfair labor practice charge filed on March 10 by Local Union 74, Service Employees International Union, AFL-CIO, CLC (the Union), alleges that the College of Mount Saint Vincent (Respondent) engaged in surveillance of the union activities of its employees, interrogated its employees regarding their union activities, threatened them that they would be discharged or replaced by outside contractors if they voted for the Union, and told them that it would be futile to vote for the Union, in violation of Section 8(a)(1) of the Act. The complaint further alleges that on about March 2, Respondent nullified an agreement that it had with employee Felix Aponte wherein he would receive pay for travel time to and from work for work after normal working hours, and that on about March 5 Respondent discharged Aponte. It is alleged that the agreement was nullified and Aponte was discharged due to his activities on behalf of the Union, and that Respondent therefore violated Section 8(a)(1) and (3) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with an office and place of business in Riverdale, New York (the facility), which is Respondent's Riverdale campus, has been engaged as a private independent college. Annually, in the course and conduct of this operation, Respondent derives gross revenues in excess of \$1 million and purchases and receives goods, products, and materials valued in excess of \$5000 from points directly outside the State of New York. Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹Unless indicated otherwise, all dates referred to herein relate to the year 1992.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Respondent is a private independent college with a campus located in Riverdale, in the Bronx, New York. The campus contains numerous buildings housing administration and faculty offices, classrooms, and student dormitories. These buildings, and the campus grounds, must be maintained and, for that reason, Respondent employs maintenance employees in different categories to maintain and repair the building and equipment at the facility. Felix (also called Alex) Aponte was employed by Respondent as a plumber from August 1991 until March 5. Respondent's maintenance employees were not represented by any union. In about early January, Richard Bennardo, business agent for the Union, attempted to make contact with these employees and gave his business card to an employee, who then gave it to Aponte. That evening Aponte called Bennardo and told him that he was interested in unionizing the maintenance employees, and that he would speak to his fellow employees and get back to him. He talked about the Union with other employees at the facility while on breaks, at meals, or on jobs and called Bennardo and a meeting was scheduled at Aponte's apartment on January 24 at about 5 p.m. Bennardo, Aponte, and two or three of his fellow employees attended the meeting. They spoke about the employees' concerns and the Union's benefits. Bennardo also distributed union literature. Another meeting was scheduled for January 30, also at Aponte's apartment. This time about 10 coworkers attended. Bennardo again explained the benefits that the Union could obtain for the employees and answered employees' questions. He then told the employees about authorization cards and that the Union needed a certain amount of signed authorization cards before they could obtain recognition or an election. Aponte and others signed cards at that time. Bennardo needed additional cards and gave some blank cards to Aponte and Juan Torres to distribute. During about the next week to 10 days, Aponte obtained an additional 14 authorization cards from his fellow employees and Bennardo picked them up at his apartment. The Union sent Respondent a letter requesting recognition on February 11 and filed a petition with the Board on February 13. A hearing was conducted on March 20 and an election was held on May 1. Violet Paretti, Respondent's chief financial officer, testified that she did not know "specifically" which of the employees was involved with the Union, but she had an "assumption" that Aponte was involved.

Aponte and, presumably, the other maintenance employees worked a schedule of 8 a.m. to 4:15 p.m. However, because of the nature of Respondent's operation with students residing in the dormitories and classrooms being used after 4:15 p.m., it was necessary to ensure that some of these maintenance employees were available to come to the facility to repair equipment outside of their regular work hours. For this reason, Aponte, and a few other maintenance employees were "on call" during their off hours and were given a beeper in order for Respondent to contact them. Aponte testified that during the summertime he received few calls of this nature, but during the heating season he received about 10 hours of overtime weekly in this manner. The procedure that

was followed with these calls was that the security guard at the main gate to the facility called or beeped Aponte or one of the other maintenance employees and told him of the problem. The employee then went to the facility, repaired the problem, and returned home. The instant matter was caused by the confusion (or disagreement) on how the employees were to be paid for these calls. For example, Aponte lived about 10 minutes from the facility. If he was called and repaired the malfunction in 30 minutes, should he be paid for 30, 40, and 50 minutes (including travel time both ways), or more and should he be paid the regular hourly rate or at time-and-a-half?

Aponte testified that about 2 to 3 weeks after he began working for Respondent, Vincent Girardi, chief engineer and supervisor for Respondent, who is no longer employed by Respondent and did not testify herein, told him that if he got called, the guard at the gate was to punch his timecard when he hung up on Aponte, and he would receive an hour traveling time plus a minimum of 2 additional hours pay. Anything over 3 hours would be paid at time-and-a-half. He testified that this arrangement was made between he and Girardi; he is not aware of who else knew of it or if any of the other maintenance employees had the same arrangement. Paretti testified that she was unaware of this arrangement until a month after Aponte was fired. At that time, counsel for Respondent told her that he was informed of it at that time by Donald McCaffery, security guard for the Respondent. She testified that in about September 1991 she asked Girardi if it was fair that the employees were only being paid (at time-and-a-half, she testified) for the actual time that it took them to perform the repairs, not travel time and with no minimum. She testified that Girardi's response was: "Time and one half is plenty."

McCaffery, who worked at the main entrance to the facility, testified that the normal procedure was that when the maintenance employee arrived at the main gate, he punched in his timecard, and when he passed the main gate as he was leaving, he punched his card out as well. He does not recall ever doing it differently for any of the maintenance employees. He testified that in about February or March, when Aponte was on his way out past the main gate he told McCaffery that when he called him to come in on a call he was to punch him in as soon as he hung up. McCaffery asked him who said so and Aponte said that Girardi said so. McCaffery said that he would check with Girardi. As Girardi was driving past the main gate that day McCaffery told him what Aponte had said and asked if he should do so. Girardi threw up his hands, mentioned a few curse words, and said: "Yes, do it." Girardi never told him to do it for any other employee. He never did punch Aponte in as requested because a few days later, Harry Sommer, Respondent's head of security, told him that Paretti said that nobody was to be punched in until he was at the gate in front of him.

Torres, who has been employed by Respondent since 1987 as a maintenance employee for electrical work, principally, and plumbing as well, testified that when he came in on a call, the guard punched him in when he arrived and punched him out when he left. He did not receive any extra compensation for his calls, except that he was paid time-and-a-half for the time he actually spent at the facility, but he was aware of Aponte's arrangement with Girardi. Liam McHugh, who has been employed by Respondent as a maintenance

electrician for 3 years, testified that on none of the occasions that he was called was he punched in at the time of the call. Rather, on each of these occasions, he punched his timecard in and out when he arrived at and left the facility. He also testified that he was unaware that Aponte had a different arrangement for his calls because to his knowledge the Respondent's procedure was to punch an employee in when he arrived at the facility not when he received the call. He spoke to Girardi two or three times about this situation, once when Aponte was present and once when he was not present. On these occasions he told Girardi that the employees should get a minimum of 4 hours' pay regardless how long the call took. On each occasion Girardi responded that he could not give it.

Security guard, Alan O'Brien, testified that on those occasions that he works at the main gate at the facility, the procedure is that when the maintenance employee comes through the main gate the guard punches his timecard. Aponte (on February 29 as will be discussed below) was the only employee who ever asked him to punch his card from over the telephone.

There are a number of 8(a)(1) allegations herein. Aponte testified that Respondent sent him to take a course with the Department of Health to be certified for operating swimming pools. The course was given from February 24 through 27. When he returned home on that last day, he called Girardi and told him that he had passed the course and had been certified. Girardi said that he knew he would pass. Girardi then asked him if he had anything to do with the union activities on the campus; Aponte denied it, because he was afraid. Girardi then said that a union could not come on to the facility because, if it did, Respondent would get rid of everybody and hire outside contractors like they did at Manhattan College. Aponte, again, denied knowledge of the union activities, and that was the extent of the conversation. On the following day, while Aponte was in Girardi's office, without any other employee present, Girardi again told him that if the Union came in Respondent would hire outside contractors to perform the work. Torres testified that sometime before Aponte was fired (while Torres was a credible witness, he had a very poor recollection of dates), while he was alone with Girardi in his office, Girardi said that he knew about some meetings taking place, and he asked Torres if he knew who was giving out cards for the Union. Torres said that he did not know anything about it, and Girardi said that he hoped that Torres was not involved, because, if he was, he would probably be fired. Girardi also said that he knew that it was either he or Aponte that was involved with the Union. Torres testified further that after Aponte was fired, while he was in Girardi's office, Girardi told him that he knew that he was running the union plans, and if he was involved in it, he will soon be the second one to go out.

Aponte was terminated on March 5, allegedly because of an incident that occurred the prior evening. However, as background, there was testimony about an incident that occurred on February 29. O'Brien was the security guard on the main gate that day and he was informed that there was a problem in the boilerroom of the administration building. Classes were taking place and he was told that people were complaining about the lack of heat. He had the names of people to call, and he called Aponte. He told Aponte that he was needed because there was no heat in the administration

building. Aponte told him that he would be there in 10 minutes, and that O'Brien should punch him in. He did it, "because I wasn't familiar with anything . . . I didn't know. But then I got suspicious." Aponte did the work and "left quite early," at 2 p.m. or earlier, and on the way out told O'Brien to clock him out at 4 p.m. O'Brien said nothing, but did not clock him out because he felt that it would have been improper to do so. Instead, he left Aponte's card on the side and, later, informed Sommer of what had occurred. Sommer told him to prepare an incident report on what had occurred, and he did so.

As February 29 was a Saturday, the first workday after this incident was Monday, March 2. Paretti testified that when she arrived at the facility that morning she walked into the maintenance office and heard Aponte and Girardi talking to Liz Milligan, the secretary to the maintenance department. Aponte said that the guard made a mistake on his card and he should be entitled to overtime for working on Saturday. When Paretti got to her office she received a call from Pam Lubbers, Respondent's director of adult education, who said that the weekend college had to be canceled on Saturday because the building was "absolutely freezing." Shortly thereafter, Sister Margarite told her that the students were sent home because of the cold and the lack of heat, although she thought that she heard some steam earlier in the morning. She asked for, and received, a report from Lubbers on what had occurred on Saturday. Later that morning, when Paretti saw Aponte and Girardi, she asked Aponte if there was heat on Saturday and if he went upstairs to see if it was coming through. He said that he did not, but he had checked a riser on the floor and it had heat. Shortly thereafter, Sister Doris Smith, Respondent's president, told Paretti that she was at the facility on Saturday afternoon and there was no heat in the administration building. On the basis of these conversations, she told Girardi to have Aponte prepare a report on what he did on Saturday. On the next day, Girardi told Paretti that Aponte did not want to write the report; Paretti told Girardi: "If I have to report to people about it . . . he has to report to me. I said he has to write it up." Aponte refused to do it so Girardi wrote the report, by date of February 1. Meanwhile, on Monday, after telling Girardi that she wanted Aponte to write up the events of Saturday, she told Sommer to check on Aponte's whereabouts on Saturday. On the following day Sommer told her that O'Brien said that when he called Aponte to come in, Aponte told him to punch him in over the phone and when he was leaving, to punch him out a few hours later. Paretti told Sommer to have O'Brien prepare a report on the incident and told him: "I hope all your men know that they punch in when a person comes to the gate and punch out when a person leaves." Sommer said that he would make sure his men knew of that.

Aponte testified that he received a call about the lack of heat in the administration building on February 29; he told the guard with whom he spoke to punch in his timecard (which he did) and he went to the facility, although there is no testimony about what work he did that day. On Monday, Girardi told him that he was instructed to ask him to write a report on what he did on February 29 because there was no heat in the building on that day. Aponte asked how can there have been no heat on that day when nobody called him about it, and there was heat on Monday morning.

Admittedly, McCaffery, the security guard at the main gate, called Aponte on the evening of March 4 to report to the facility to repair the boiler at Seaton Hall, a dormitory housing about 60 students. Admittedly, Aponte (who lives about 10 minutes from the facility) did not report as requested because McCaffery refused to punch his timecard over the phone. What is in dispute, and may be of some importance, is the time of the call. Respondent's witnesses testified that the call was made between 8 and 8:30 p.m. (at the latest). Aponte and Bennardo testified that Aponte received the call between 9 and 9:30 p.m. The timing is important because, pursuant to law, the boiler (which controls the heat and hot water in the building) would have automatically turned off at 11 p.m. The argument of the General Counsel and the Charging Party is that even if Aponte had gone to the facility, he would not have arrived there until 9:30 to 10 p.m. If it took him 30 minutes to an hour to repair the boiler, it would automatically cut off shortly thereafter, thereby making little difference in the comfort of the dorm residents.

Curtis Lanton, head resident of Seaton Hall, and Anthony Esposito, resident assistant at Seaton, testified to the situation on March 4. The resident assistant sits at the front desk at the dorm beginning at 8 p.m. to oversee the people going in and out of the dorm. When Lanton returned to Seaton Hall between 7 and 7:30 p.m. there were notes on his door complaining about the lack of heat. When Esposito arrived at 8 p.m., he and Lanton called the security guard at the main gate, told him that there was no heat, and asked him to call maintenance to have somebody repair the situation. About 10 minutes later the security guard called back and said that he called maintenance, told him of the problem, but they said that they could not do anything about it that night. About 5 minutes later Lanton called the security guard again and told him that it was very cold and something had to be done. The guard said that he would attempt to get the guard to come out, but the way he sounded the first time he did not think that he would come. Lanton left for a 9 p.m. engagement he had that evening at about 8:30 p.m.; it was a distance of about 15 to 20 minutes. He arrived before 9 p.m. On the following morning Lanton wrote a report about the incident. Lanton and Esposito each testified that they called the guard at the main gate at about 8 p.m., but no later than 8:30 p.m. McCaffery testified that he received the call from Lanton at about 8 p.m., but he was positive that it was no later than 8:30 p.m., and within 5 to 10 minutes he beeped Aponte, who called him in less than 10 minutes. When asked whether it was possible that he did not call Aponte until 9:30 p.m., he testified: "No, no, the place would have been freezing by then."

Aponte testified that on the evening of March 4, at about 9:30 p.m., while he was on a telephone call with Bennardo, he was beeped by the guard at the main gate. He hung up with Bennardo, called the main gate and was told of the lack of heat at the Seaton dorm. Bennardo testified that between 9 and 9:30 p.m. that evening he called Aponte and it was during that call that Aponte was beeped by the guard at the gate. Bennardo places the time in that area because March 4 was Ash Wednesday. He and his wife went to church, got out a little after 8 p.m., dropped off his wife's aunt, stopped for a slice of pizza, and then went home, which would have been between 9 and 9:30 p.m.

Putting aside the time of the call, there is general agreement on the remaining events that evening. When Aponte called McCaffery, McCaffery told him that the boiler at Seaton was out and that he should come in to fix it. Aponte said: "I'll work on it. Hit me in right now." McCaffery said that he could not do that and Aponte said: "If you don't hit me in, I am not coming in." McCaffery said that he wasn't hurting him, he was hurting the students because the dorm was freezing. Aponte then asked for Girardi's home telephone number, which McCaffery gave him and then McCaffery called Lanton and said that he could not get anybody to repair the boiler. After ending the phone conversation with McCaffery, Aponte called Girardi, but he was not home. He left a message with Girardi's wife. Aponte did not go to the facility that evening to repair the boiler at Seaton dorm.

He reported for work, as usual, the following morning. When he met Girardi at 8 a.m. he informed him of what occurred the prior evening and Girardi told him not to worry, that he would take care of it. At about 10 a.m., Girardi told him that Paretti wanted to speak to him. At this meeting, which was attended by Paretti, Sommer (who, that morning, told Paretti of the prior evening's events), Blanche Marrin, Respondent's personnel assistant, Girardi, and Aponte, Paretti asked Aponte if he had gotten a call the prior evening about a heating problem at Seaton dorm; he said that he did. Paretti testified that he said that he got the call at about 11 a.m.; Aponte testified that he told Paretti that he got the call at about 9:30 a.m.. Paretti told him that her information was that he was called at about 8 a.m. Paretti asked him if he told the guard that he would not come in unless he was clocked in by phone and (she testified) he said that he did. Aponte testified that he does not recall responding in that manner. Aponte then told her that he had an agreement with Girardi providing that he would be clocked in by phone when the call was made. Paretti asked Girardi if that was so, and he said that it was not. Paretti told Aponte that if he had a problem with the alleged agreement that he had with Girardi, he should have come to work, performed the work and discussed it with Girardi the next day. She told him that he was fired and gave him a letter stating that he was dismissed for refusing to respond to an emergency call.

The record establishes that up until February 29, Aponte had an unblemished work record. This is illustrated by the fact that Respondent chose him, among all of its maintenance employees, to take the pool certification course.

Respondent defends that, even if Aponte had an agreement with Girardi that he would be clocked in when he received a call (which they did not learn of until later), Aponte's obligation was to come in and do the call and to later grieve the loss of hours. In this regard, Respondent introduced into evidence its staff handbook, which provides for a grievance procedure. Step 1 provides that the employee discusses the situation with his/her immediate supervisor. Step 2 is a complaint to the administrator in charge of personnel. If the employee is not satisfied with that response, the next step is an appeal to a grievance committee composed of "3 peers selected by the grievant and 2 administrators not involved in the grievance. The latter will be asked to serve by the Administrator in charge of the Personnel Office." After hearing the matter, the grievance committee submits a written report

to the Respondent's president, or designee, whose decision is final.

Counsel for the General Counsel adduced testimony to establish disparate treatment. Torres testified that he did not report for a call on Christmas Eve, 1991 involving a boiler not working in one of the dormitories. On cross-examination, he testified that he was beeped at 10 p.m., while he was in New Jersey on Christmas Eve, after the semester had ended and Christmas break was taking place. By the time he could have arrived at the facility, it would have been 11 p.m. and the boiler would have shut off. He told the security guard that he would take care of it in the morning, and the guard said that was fine with him. Employee Angela Marsili, an employee at Respondent's library, was given two written warnings in July 1991 for refusing to clean the men's bathroom at the Hayes Auditorium. Her explanation was that she did not want to clean the men's bathroom. The warning states that if she refused again, she would be terminated. Maintenance employee Liam Kelly was terminated after receiving three warnings in early 1991 for not calling in when he was not going to be at work and for tardiness and an uncooperative attitude. In November 1989, a maintenance employee was suspended for a week for insubordination to his supervisor.

IV. ANALYSIS

Aponte was involved in three conversations with Girardi involving alleged 8(a)(1) statements; Torres was involved in two such conversations with Girardi. Girardi, who was subsequently discharged by Respondent, did not testify. Torres, who has no apparent interest in this matter and is still employed by Respondent, was a credible, although inexact, witness and I have no difficulty crediting his testimony regarding these statements by Girardi. Aponte was not as credible a witness. In answer to questions from the General Counsel, he was direct and, apparently, forthright. In answer to questions on cross-examination, however, his testimony was, at times, vague and guarded. Based upon the failure of Girardi to testify, and Torres' credible testimony of similar statements, I credit Aponte's statements in this regard. I therefore find that Girardi made these statements as alleged. Case citations are not needed to establish that by these statements Respondent violated Section 8(a)(1) of the Act. I therefore find that Respondent violated Section 8(a)(1) of the Act by interrogating its employees regarding their union activities, threatening its employees that they would be replaced by outside contractors if they supported the Union, threatening to discharge its employees because of their activities on behalf of the Union, and creating an impression among its employees that their union activities were under surveillance by Respondent.

The 8(a)(3) allegation is more difficult. Clearly, the General Counsel has sustained its burden under *Wright Line*, 251 NLRB 1083 (1980). Aponte was the leading supporter for the Union; he was the employees' contact with Bennardo, he appeared to have solicited most of the authorization cards and had the union meetings at his home. In addition, Paretti testified that she assumed that Aponte was involved with the Union. The timing of the discharge is suspicious because it occurred 1 month after Aponte signed his card for the Union and within a week of Girardi's 8(a)(1) conduct. It is also suspicious because prior to February 29, Aponte had an unblem-

ished work record, although he had only been employed by Respondent for about 6 months. The crucial question is whether Respondent has satisfied its burden of establishing that it would have fired Aponte even absent his union activities. I find that it has. Initially, I credit the testimony of McCaffery, Lanton, and Esposito that McCaffery was notified of the boiler malfunction about 8 p.m. and beeped Aponte a few minutes later. Although Bennardo appeared to be a credible witness, I found McCaffery, Lanton, and Esposito to each be very credible witnesses with no reason to lie. I therefore find that Aponte could have gotten to the facility by 8:30 p.m., with plenty of time to get the boiler running before it shut off automatically at 11 p.m. He did not do so because McCaffery refused to clock him in over the phone. Aponte refused to report rather than reporting, repairing the boiler and then grieving the matter with the Respondent. *Carolina Freight Carriers Corp.*, 295 NLRB 1080 (1989). His decision resulted in the residents of Seaton having no heat until the next day. Whereas counsel for the General Counsel minimizes Aponte's action, I am sure that the residents of the dorm did not minimize the results of his refusal to appear. It is true that Aponte had an agreement with Girardi that he would be clocked in over the phone when he was called in to work, but I credit Paretti's testimony that she was unaware of this arrangement until a later time.² In fact, it appears that only Torres was aware of this arrangement. McHugh's attempts to obtain additional compensation for these calls were rebuffed by Girardi as was Paretti's inquiry as to whether additional compensation was warranted. The inescapable conclusion is that Girardi was a "loose canon" who was inconsistent in applying Respondent's rules.

Counsel for the General Counsel, in her brief, argues that the testimony regarding the February 29 incident "seems to have no point." My initial reaction was similar until I realized that there were two points to this testimony: one was that Paretti received complaints about Aponte's work prior to March 4. More importantly, the confusion in O'Brien's mind about Aponte's requests, caused him to alert Sommers about the situation (resulting in O'Brien preparing a report on the situation) which resulted in Sommers telling McCaffery not to clock anybody in until he arrived at the main gate. Presumably, because of this order, McCaffery refused to punch Aponte in on March 4, resulting in Aponte's refusal to work.

I agree with counsel for the General Counsel that parts of Respondent's case are not fully logical. For example, when Lanton learned about 7 p.m. that there were complaints about the lack of heat in Seaton, why did he wait until Esposito came on duty at 8 p.m. to call the guard at the gate to beep a maintenance employee? I fail to see what Esposito added to that call. Also unexplained was why McCaffery failed to call Girardi, another maintenance employee or an outside contractor to repair the boiler at Seaton after Aponte refused to work. However, overall, 8(a)(1) and (3) cases are rarely airtight sure things. Some amount of doubt lingers in most of these cases, and the instant matter is no exception. However, an administrative law judge's responsibility is to decide whether all the evidence establishes that Respondent would

²Because Respondent was unaware of this arrangement at the time, I recommend that the allegation that Respondent nullified the agreement between Aponte and Girardi in violation of Sec. 8(a)(3) of the Act be dismissed.

have acted in the same matter even if the discriminatee had not engaged in protected activity. I find that Aponte's action was serious and inexcusable, and resulted in substantial discomfort for the residents of Seaton that evening. The lack of any animus toward any other employee, and the lack of any 8(a)(1) conduct by any one other than Girardi, convinces me that Aponte would have been fired even if he was not the most active union adherent. I also do not find persuasive the General Counsel's attempt to establish disparate treatment. For example, the Torres situation of Christmas 1991 is not analogous to the instant situation. Torres was in New Jersey when he was beeped at 10 p.m.; even if he had left immediately, he probably would not have arrived at the facility much before 11 p.m. In addition, this incident occurred during the Christmas break when the students were not in the dormitory. For these reasons I recommend that the 8(a)(1) and (3) allegation be dismissed.

CONCLUSIONS OF LAW

1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following activity:

(a) Interrogating its employees regarding their union activities.

(b) Threatening its employees that they would be replaced by outside contractors if they supported the Union.

(c) Threatening to discharge its employees because of their activities on behalf of the Union.

(d) Creating an impression among its employees that their union activities were under surveillance by Respondent.

4. Respondent did not violate the Act as further alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, College of Mount Saint Vincent, New York, New York, its officers, agents, and successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their union activities.

³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Threatening its employees that they would be replaced by outside contractors if they supported the Union.

(c) Threatening to discharge its employees because of their activities on behalf of the Union.

(d) Creating an impression among its employees that their union activities were under surveillance by Respondent.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its administration building at the Riverdale campus copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the 8(a)(3) allegations of the complaint be dismissed.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees regarding their activities on behalf of Local Union 74, Service Employees International Union, AFL-CIO, CLC.

WE WILL NOT threaten our employees that they will be replaced by outside contractors if they support the Union.

WE WILL NOT threaten to discharge our employees because of their activities on behalf of the Union.

WE WILL NOT create an impression among our employees that their union activities are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

COLLEGE OF MOUNT SAINT VINCENT